Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

Docket No._____

UNITED STATES SUPREME COURT

OCTOBER TERM, 2005

EX PARTE, JESSIE D. MCDONALD,
Petitioner

PETITION FOR EXTRAORDINARY WRIT

Petition for Writ of Mandamus

For the Petitioner:

Dr. Jessie D. McDonald, Ed. D.
2134-14th. Avenue North
Nashville, Tennessee
(615) 943-6355

QUESTIONS FOR REVIEW

1. Whether judges enjoy immunity when they forecloses a litigant's rights to access of the court to seek relief from an aggrieved judgment that is void and binding on no one, in absence of law or other authority?

2. Whether court clerks failed to perform the ministerial duties of their office when they refused to accept applications for an extraordinary appeal, or transfer the record to the appellate court for an appeal?

3. Whether a trial judge failed to perform a ministerial duty by refusing to enter a final decision on a motion properly presented before the court ?

3. Whether judges are acting in their judicial Capacity and enjoy immunity from damages when accessed court costs and attorney fee's when the petitioner was never indicted for the crime the conviction is based on?

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PARTIES TO THIS ACTION

Michael W. Catalano, Clerk for the Tennessee Supreme Court, at Tennessee Supreme Court Building, Room 100, 401 Seventh Avenue North, Nashville, Tennessee 37219.

Cheryl Blackburn, Judge for Division III, Criminal Court for Nashville and Davidson County, Tennessee, at 601 Mainstream Drive, Nashville, Tennessee 37228.

Frank F. Drowota, III, Retired Chief Justice, Tennessee Supreme Court, 407 Sunnyside Drive, Nashville, Tennessee 37205.

David Torrence, Clerk for Davidson County Criminal Courts,

Orders Entered by Court

December 13, 2005, Division III, Criminal Court entered an Order refusing to enter a final Order on a pending Motion for Relief from Judgment under Rule 60(b), of Tennessee Rules on Civil Procedure. [Exhibit #1] and included in the Appendix of this petition.

December 19, 2005, Michael W. Catalano, Clerk for the Tennessee Appellate Courts, he was returning the application for extraordinary appeal, with $1,000 cash appeals bond, in compliance with an Order from Justice Frank Drowota, Chief Justice of the Tennessee Supreme Court, on February 03, 2005 and November o6, 2003. [Exhibit #2] Appendix of this petition.

Statement on Jurisdiction

In exercise of this court's appellate jurisdiction, the petitioner respectfully submit this application for a writ of mandamus to compel: Judge Cheryl Blackburn and Michael W. Catalano, Clerk for the Tennessee Supreme Court to perform their ministerial duties: to render a final Order of Judgment; and to follow procedure under Rule 10 of Tennessee Rules on Civil Procedure for appeals, and exceptional circumstances warrant this Court's discretionary powers, since state orders deprive petitioner of access to all state courts to get relief from a void order.

Order entered December 13, 2005, Cheryl Blackburn, Judge for Division III, Criminal Court for Nashville and Davidson County, Tennessee, refusing to perform her ministerial duties of considering the Motion for Relief from a void judgment for a criminal conviction, in the absence of an indictment, submitted in compliance with Rule 60(b) of Tennessee Rules on Civil Procedure.

There was no application for a rehearing submitted to the trial court, or the clerk of the Tennessee Appellate Courts.

Statutory Provision

This Court has jurisdiction under 28, § 1651(a) of the United States Codes for extraordinary relief.

Notification on Attorney General

The Tennessee Attorney General has been notified of this application, by service in compliance with Rule 12.3 of this court rules, by Proof of Service, which is accompanying this application.

U. S. Constitutional Provision

AMENDMENT 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury", . . . [pertinent section supplied]

Statement of the Case

The federal question was first observed by the court of criminal appeals on direct appeal, in the Opinion entered on May 13, 1975, as shown below:

On May 13, 1975, the Tennessee Court of Criminal Appeals reversed the conviction against the Petitioner, Jessie D. McDonald, and acknowledge on page 5 of the Opinion, he was convicted of a crime that was not charged in the indictment. The appellate court remanded the case for further proceedings, not inconsistent with its opinion. [Exhibit #3]

January 19, 1976, the Tennessee Supreme Court reversed the appellate court's judgment on grounds other than on the question involving the indictment.

[Exhibit, #4 – Opinion]

November 30, 2005, McDonald filed his Motion for Relief from a void judgment, under Rule 60(b),TRCP, which the trial court refused to consider and submit a final Order.

Statement of Case Continues

December 16, 2005, McDonald submitted a Rule 10, application for extraordinary appeal, after posting the required $1,000.00 cash surety bond, on grounds Judge Blackburn has departed from the accepted and usual course of judicial proceedings, by refusing to render a final order.

December 19, 2005, Michael W. Catalano, Clerk, issued a letter, advising he was returning the application for extraordinary appeal and $1,000.00 cash bond, in compliance with two previous Orders from the Chief Justice of the state supreme court.

Argument

Judge Blackburn, Judge in the court where the conviction was rendered, issued an Order on December 13, 2005, showing her intentions to refuse to consider the Motion for Relief from Judgment to submit a final Order. The act of a judge in signing judgment is a "ministerial" and not a "judicial" act. *Life & Fire Ins. Co. of New York v.*

Wilson's Heirs, 33 U.S. 291, 8 Pet. 291, 8 L. Ed. 949. Mandamus is restricted in the main to situations where ministerial duties of a nondiscretionary nature are involved. *Panama Canal Co. v. Grace Lines, Inc.*, 78 S. Ct. 752, 356 U. S. 309, 2 L. Ed. 2d 788, amendment denied 78 S. Ct. 1367, two cases, 357 U. S. 923, 2 L. Ed. 2d 1368. The actions of Judge Blackburn was similar to an incident in the federal courts in New York and this court responded and said, "A rule was granted to show cause why mandamus should not be awarded to a district judge commanding him to do certain acts relative to a cause instituted in the district court". *Ex parte Bradstreet*, 31 U.S. 774, 6 Pet. 774, 8 L. Ed. 577. In the case at bar, Division III, Criminal Court for Davidson County is the court where the conviction was rendered and if the case is no longer assigned to her court, she has a ministerial duty to transfer any pleadings related to the case, to the proper court where the case is assigned. It is clear, the petitioner do not have jurisdiction, or authority to

assign his case to any court. Division II was asked to consider a previous application for habeas corpus relief, which the convicting court did not have jurisdiction to consider. The Rule 60(b) Motion for Relief from Judgment was submitted to Division III, Criminal Court, with a prepared Order and the court refused to acknowledge receiving the motion when it was all sent at the same time, in the same envelope, where the conviction occurred.

Upon Judge Blackburn refusing to perform a ministerial duty, the petitioner has a remedy under Rule 10, of Tennessee Rules on Civil Procedure, for extraordinary appeal, when the trial judge has so far, departed from the accepted and usual course of judicial procedure.

When Michael W. Catalano, Clerk for the Appellate Courts refused to process the appeal, in accord with Orders from the chief justice of the state supreme court, clearly showed that he failed to perform a ministerial duty, when he had no discretion in the matter. Petitioner has a right to an

appeal under Rule 10 of TRAP for an extraordinary appeal, when the trial judge departs from the accepted and usual course of judicial proceedings. The equal protection clause requires that once a state establishes avenues of appellate review, those avenues must be kept free of unreasonable distinctions that can only impede open and equal access to the courts. *Rinaldi v. Yeager*, 384 U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577; *Williams v. Oklahoma City*, 395 U.S. 458, 89 S. Ct. 1818, 23 L. Ed. 2d 440; *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656; also see, *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L Ed. 2d 628. Mandamus may be used to restrain inferior courts to keep them within their lawful bounds and to do that justice which they are in duty and by the virtue of their office, bound to do. *Com. Of Virginia v. Rives*, 100 U.S. 313, 25 L. Ed. 667. Mandamus may be employed to compel an inferior court to decide a matter pending before it"... *Ex parte Loring*, 94 U. S. 418, 24 L. Ed. 165. This court may

issue a mandamus to trial court to proceed to judgment, in aid of this court's appellate jurisdiction. *Ex parte Many*, 55 U. S. 24, 14 How. 24, 14 L. Ed. 311. Under the Rule 10 appeals process, the clerk of the appellate court is without discretion and the chief justice of the state supreme court is likewise, without jurisdiction to foreclose the petitioner's rights to have access to the state courts to seek relief from a void judgment that was entered by the trial court, in the absence of an indictment to support the charge the conviction was based on, as required under the 5th. Amendment to the United States Constitution. Mandamus lies to compel a court to take jurisdiction upon appeal of a cause improperly dismissed by it. *Ex parte Parker*, 7 S. Ct. 767, 120 U. S. 737, 30 L. Ed. 818, and will require the appeal be reinstated. *Ex parte Parker*, 9 S. Ct. 708, 131 U. S. 221, 33 L. Ed. 123.

Relief Sought

For the foregoing reasons, the Petitioner, Jessie D. McDonald, respectfully request this court to instruct Michael W. Catalano, Clerk for the Tennessee Appellate Courts to perform his ministerial duties by accepting any and all appeals that are presented in accord with the appellate process as allowed all appellants; and to further instruct Judge Blackburn to perform the ministerial duty of her position, by submitting a final Order on the pending motion that was presented for relief from judgment under Rule 60(b) of TRCP; and all other and further relief the court deems proper.

Respectfully submitted,

Jessie D. McDonald

Dr. Jessie D. McDonald, Ed. D.

APPENDIX INDEX

Documents	Pages
Exhibit #1 – Order – Division III, Criminal Court;	13,14
Exhibit #2 – Letter from Michael W. Catalano: Order entered: 2/03/05 and 11/06/03;	15-24
Exhibit #3 – May 13, 1975-Opinion from appeal;	24-41
Exhibit #4 – January 19, 1976, Opinion Tennessee Supreme Court;	42-52

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIVISION III

STATE OF TENNESSEE	)	
	)	
V.	)	Case No. B-317
	)	
JESSIE MCDONALD	)	

ORDER

Defendant mailed a pro se Order to this Court in an envelope with a postmark of November 26, 2005.[1] In this pro se Order, Defendant states that the Court has heard his "Motion for Relief of Judgment" (said motion was never received by this Court but it appears it was filed in Division II) and finds that "the judgment is void because there has never been an indictment against him for the crime that he was convicted of." (Pro Se Order, at 1). With the pro se Order, Defendant also included a "Notice of Hearing" where

[1] The Court received Petitioner's Mailing on November 30, 2005.

he indicated that his Motion for Relief from Judgment is set for hearing on December 9th., at 8:00 a.m.[2]

The Court first points out that case number B-317 is not a case assigned to this Court. Since this case was initiated in 1973, it has been before Division II of the Criminal Court. Further, this Court finds no basis to sign Defendant's pro se Order.

Defendant was convicted in 1974. Since then, there has been numerous post-trial proceedings on this matter in Division II, including an order on a motion to reconsider dismissal in 2004, habeas corpus in 2004, and a writ of error coram nobis in 2005. It appears that Defendant is attempting to "judge shop" by filing the current pro se order in a court not familiar with Defendant's previous filings in attempts to gain an advantage. This Court will not encourage this behavior. Therefore, should Defendant elect to file any

[2] It is this Court's practice to set its own motions and a hearing was not held that day.

additional pleadings with this Court, the Court shall deem the motion summarily dismissed and simply place Defendant's filings in this court file without issuing a written Order. Defendant does not have any cases pending in Division III.

IT IS SO ORDERED.

ENTERED this 13 day of December, 2005.

Cheryl Blackburn, Judge/s/

cc:

The Honorable Jim Sledge,
Assistant District Attorney General
222 Second Avenue North
Washington Square, Suite 500
Nashville, Tennessee 37201-1649

Mr. Jessie McDonald
2134 Fourteenth Avenue North
Nashville, Tennessee 37208

The Honorable Randall Wyatt,
Criminal Court, Division II

Office of
Clerk of the Courts
Michael W. Catalano

Supreme Court
Court of Appeals
Court of Criminal Appeals

State of Tennessee

Dr. Jessie D. McDonald, Ed. D., Ph. D.
2134 14th. Avenue North
Nashville, TN 37208

RE: McDonald v. State/Rule 10 CCA

Dear Dr. McDonald:

As you are aware, the Supreme Court has entered two orders regarding filings by you relative to the January 16, 1976, judgment of the Supreme Court. The first order was filed November 6, 2003, and the second was filed February 3, 2005. Copies of these two orders are enclosed for your convenience.

Today, due to an oversight of my Chief Deputy Clerk, you filed a Rule 10 application with the Court of Criminal Appeals and deposited with our office the sum of $1,000.00 in cash as a cost bond. Mrs. Rawls, the Chief Deputy Clerk, wrote you a receipt for this amount.

Mrs. Rawls came to me when she realized the error in accepting this filing, and I instructed her to have the $1,000.00 refunded to you. Due to the holidays approaching the staff who are responsible for the process of refunds will be out of their offices for the next two weeks. Your check will be forwarded to you at the earliest possible date which will probably be after the first of the year.

Enclosed please find the documents which you filed with our office and which have had the "file" date December 19, 2005 marked through stating "error" and initiated by Mrs. Rawls. The copies given to you which were file stamped should be discarded due to the error.

Sincerely,
Michael W. Catalano, /s/
Appellate Court Clerk

Filed: February 03, 2005

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

JESSIE D. MCDONALD V. STATE OF TENNESSEE

No. M2005-00205-SC-R10-HC

ORDER

On January 20, 2005, Jessie D. McDonald, acting pro se, submitted to the Appellate Court Clerk's Office a document styled "Rule 10 Application for Permission to Appeal Criminal Court No. 1973-B-317." This document requests review of an August 18, 2004, trial court order denying the latest of many pro se habeas corpus petitions Mr McDonald has filed challenging a judgment affirmed by this Court more than twenty-five years ago. See State v. McDonald, 534 S.W. 2d 650 (Tenn. 1976).

In a July 7, 2003, Order denying Mr. McDonald's sixth motion to recall the mandate of the 1976 judgment, this Court directed the Appellate Court Clerk's Office "to return to Mr. McDonald any future motions which request this Court to recall the mandate of its January 19, 1976 judgment." On November 4, 2003, Mr. McDonald filed in this Court a document titled "Petition for a Writ of Habeas Corpus, " which again challenged the 1976 judgment. Recognizing Mr. McDonald's "attempt to avoid" the effect of the July Order, this Court, in a November 6, 2003, Order, attempting to close the gap by directing the Appellate Court Clerk's Office:

to discard and/or refuse to accept for filing any document – be it styled petition, motion, or pleading – which challenges or seeks relief from the January 19, 1976, judgment of this Court in State v. McDonald, 534 S.W. 2d 650 (Tenn. 1976).

On January 20, 2005, Mr. McDonald filed the present document titled "Rule 10 application for Permission to Appeal," For at least the eighth time, we reject Mr. McDonald's request for relief from the January 19, 1976, judgment of this Court. Mr. McDonald's "Rule 10 application for Permission to Appeal" is hereby DENIED.

Costs associated with this matter are taxed to Jessie D. McDonald, for which execution may issue if necessary. The Cost Center of the Appellate Court Clerk's Office shall not attempt to collect these costs from the State of Tennessee, nor shall the costs associated with any of the prior filings be collected from the State of Tennessee. These costs are the sole obligation of Mr. McDonald.

We direct the Appellate Court Clerk to henceforth discard and/or refuse to accept for filing documents addressed to this Court challenging or seeking relief from the January 19, 1976, judgment of this Court in State v. McDonald, 534 S.W. 2d 650 (Tenn. 1976), regardless of the form or the title of the document.

IT IS SO ORDERED.

FOR THE COURT:
FRANK F. DROWOTA,III,/S/
CHIEF JUSTICE

Adolpho A. Birch, Jr., J., Not Participating

Filed: November 06, 2003

IN THE TENNESSEE SUPREME COURT
AT NASHVILLE

JESSIE D. MCDONALD V. STATE OF TENNESSEE

No. M2003-0261-SC-WRH-CO

ORDER

On November 4, 2003, Jessie D. McDonald filed a pro se document styled "Petition for a Writ of Habeas Corpus" which challenges the January 19, 1976 judgment of this Court in State v. McDonald, 534 S.W. 2d 650 (Tenn. 1976). This document clearly is an attempt to avoid the dictates of a July 7, 2003 Order of this Court that denied Mr. McDonald's sixth motion to recall the mandate of the January 19, 1976 judgment and directed the Appellate Court Clerk's Office "to return to Mr. McDonald any future motions which request this Court to recall the mandate of its January 19, 1976 judgment.

Although the document is not styled "motion to recall the mandate," the relief requested is the same as the relief requested by Mr. McDonald's prior six motions to recall the mandate. Therefore, the petition is without merit and is accordingly DENIED. Any and all costs associated with this petition are taxed to Jessie D. McDonald, for which execution may issue if necessary. The Cost Center of the Appellate Court Clerk's Office shall not attempt to collect from the State of Tennessee the costs associated with this motion or the costs associated with any of the prior motions.

These costs are the sole obligation of Mr. McDonald, and until all costs are paid, the Appellate Court Clerk's Office shall not accept any filings from Mr. McDonald.

Furthermore, the Appellate Court Clerk's Office is hereby directed to discard and/or refuse to accept for filing any document – be it styled petition, motion, or pleading – which challenges or seeks relief from the January 19, 1976 judgment of this Court in State v. McDonald, 534 S.W. 2d 650 (Tenn. 1976).

FOR THE COURT:
FRANK F. DROWOTA, III, /S/
CHIEF JUSTICE

Adolpho A. Birch, Jr., J., not participating

IN THE COURT OF CRIMINAL APPEALS, AT
NASHVILLE, TENNESSEE
September 1974 Term

STATE OF TENNESSEE Plaintiff in Error, V. JESSIE MCDONALD, Defendant in Error.	) (Obtaining Property by) False Pretenses)) Case No. B-317)) Davidson County) Hon. Allen R. Cornelius, Jr.,) Judge.)

For Plaintiff in Error:

Jessie D. McDonald, Pro se
Nashville, Tennessee

For Defendant in Error:

Milton P. Rice,
Attorney General of
Tennessee

William C. Koch, Jr.,
Assistant Atty. General
Nashville, Tennessee

Robert H. Schwartz,
Assistant District Atty.
Nashville, Tenn.

OPINION FILED: May 13, 1975
REVERSED AND REMANDED

W. Wayne Oliver, Judge

OPINION

The defendant was tried and convicted under the third count of the indictment. In essence that count charges that, with the intent to defraud a named credit union (from whom he borrowed money to buy a car) , he obtained from the county court clerk a clear and unencumbered title to a $3,150 Ford LTD automobile upon which the credit union had a lien, by falsely and fraudulently representing to the county court clerk that the credit union had released its lien and the car was unencumbered "with the fraudulent and felonious intent to deprive (the credit union) of its personal property and thereby caused (the county court clerk) tp rely on said false and fraudulent representation and delivered said unencumbered title to said automobile to the said defendant, ..." (Emphasis supplied).

Thus, that count of the indictment does not charge that the defendant made any false representation to the credit union which owned the lien and was the victim, nor does it

charge that the credit union relied upon any representation by the defendant. Instead, the indictment charges that the false and fraudulent representation was made to the county court clerk and that he relied on it and issued to the defendant an unencumbered title to the automobile. So, the question immediately arises whether the third count of the indictment charges a violation of TCA §39-1901, upon which this prosecution is based.

The trial judge read that statute to the jury, and stated the elements essential to constitute a violation of it exactly as they are set forth in *Beck v. State*, 203 Tenn. 671, 675, 315 S.W. 2d 254 wherein the Court said: "Those elements are (1) the pretense, (2) the falsity of same, (3) the felonious and fraudulent intent, (4) the description of the property, and (5) the reliance of the victim upon the representations." (Emphasis supplied). In *Beck*, the prosecutor was bilked of $7,000 in money which he turned over to the defendants upon their false and fraudulent representation that they

would arrange for him to purchase a large quantity of whiskey which the sheriff had confiscated and which the court has ordered sold. Thus, the fraudulent representation was made directly and personally to the owner of the money, he was the victim and turned his money over to them in reliance upon what they said.

In *Mullican v. State*, 210 Tenn. 505, 360 S.W. 2d 35, it is emphasized that the person claiming to have been injured by the defendant's false and fraudulent representations must have parted with his property in reliance thereon, that by his false and fraudulent pretenses the defendant induced the party sought to be wronged to part with his property; and that the statute is not violated if the person claiming to have been defrauded parts with his property in reliance on the advice of others and not pn the defendant's representations.

After stating the essential ingredients necessary to constitute a violation of TCA §39-1901, as above noted, the

trial court went on to say to the jury:

". . . and the obtaining of the goods or money by false pretense and with an intent to defraud; and if the false pretenses created the credit, it is within the statute."

"You will note from the reading of Section 39-1901 of the Code above mentioned, that the law prohibits the obtaining of property by means of false pretense. Likewise, you will note the e law prohibits the obtaining of possession, intending at the time of receiving the property to feloniously steal the same. It is the State's theory that the defendant had this intention and that he further demonstrated this intentions at a subsequent date by obtaining a clear and unencumbered title to a 1972 Ford LTD automobile. Of course, it is for you, the jury, to determine what the intention of the defendant was at the time of obtaining possession of the title to a 1972 Ford LTD automobile, and it is for you to determine, if in fact, the State has proved that this defendant did in fact, obtain the title to a 1972 Ford LTD automobile, and if this fact sheds any light upon your determination of the issue of guilt in the initial obtaining possession of said property" (Emphasis supplied).

Upon the record there can be no doubt that the trial court was confused as to whether the defendant was charged with obtaining credit by false pretenses and as to whether the credit union's "property" mentioned in the indictment referred to the automobile. It is likewise clear that the jury also considered the "property" involved was the automobile,

for when they found the defendant guilty of receiving property by means of false pretenses and that they found the value of the property to be more than $100, there was a colloquy between the trial judge and the jury foreman in which the latter inquired if the jury had authority to fix the sentence at less than three years. The court replied that they could not do so if they found the value of the property over $100, and the foreman replied, "A'72 LTD is valued over a hundred dollars."

1. At any rate, it is unquestionable that the third count of the indictment upon which the defendant was convicted does not charge a violation of TCA §39-1901. He did not obtain the automobile from the credit union, and there is no charge or proof that he feloniously and fraudulently made any false pretenses or representation to the credit union in obtaining the loan. Upon the face of this indictment and upon the record, his only false and fraudulent representation was

made to the county court clerk, and that official believed and relied upon his false statement that the credit union had released its lien on the car and issued to him a clear title to it.

Whatever crime the defendant committed, it was not obtaining property by false pretenses in violation of that statute. He was, therefore, convicted of a crime not charged in the indictment. Such a conviction cannot stand. *Church v. State*, 206 Tenn. 336, 333 S. W. 2d 799; *Huffman v. State*, 200 Tenn. 487, 495, 292 S. W. 2d 738; *Clark v. State*, 197 Tenn. 67, 270 S. W. 2d 361. See also: 21 Am. 2d ., Criminal Law §226, p. 265. Conviction upon a charge not made or without evidence of guilt is a denial of due process of law. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654.

Accordingly, the judgment of the trial court is reversed and this case is remanded thereto for further proceedings not inconsistent with this opinion.

W. Wayne Oliver, Judge/s/

Concur:
Mark A. Walker, Presiding Judge/s/

(SEE DISSENTING OPINION)
Charles H. O'Brien, Judge

IN THE COURT OF CRIMINAL APPEALS, AT
NASHVILLE, TENNESSEE
September 1974 Term

Date: May 13, 1975

STATE OF TENNESSEE	) (Obtaining Property by
Plaintiff in Error,	) False Pretenses)
V.	) Case No. B-317
	)
JESSIE MCDONALD,	) Davidson County
Defendant in Error.	) Hon. Allen R. Cornelius, Jr.,
	) Judge.

DISSENTING OPINION

A jury verdict was returned in the Davidson County Criminal Court finding defendant guilty of obtaining property valued over one hundred dollars under false pretenses. The judgment of the trial court fixed punishment at three years in the State Penitentiary. On this appeal the majority have reversed the trial court judgment. I am not in accord with the views expressed in the majority opinion.

The indictment against defendant was returned at the January, 1973, term of court. The conclusion of the matter has been considerably delayed because of defendant's refusal

to accept the services of trained and competent counsel. He declined appointment of an attorney in the trial court and acted as his own counsel. At the May, 1974, term of this court at Nashville defendant was endeavoring to proceed by petition for certiorari to the trial court to dismiss the indictment and judgment against him. He appeared on his own behalf. The panel considering the matted enjoined him to procure counsel. He stated his understanding in open court that counsel would be provided for him upon proof of indigence , but refused the services of appointed counsel because he preferred to represent himself. It appears defendant has filed five or six proceedings in U. S. District Court; has appealed to the Sixth Circuit Court of Appeals and the U.S. Supreme Court at least once; has been twice before this court, and has filed at least one proceeding in the State Supreme Court, all involved with these charges.

Defendant has made numerous assignments of error on this appeal by the first of which he charges the trial court

erred in bringing him to trial on the 17th. of January, 1974, before the case was remanded back to the state court from the federal courts.

Preliminary to trial defendant brought to the attention of the trial judge that he had filed proceedings to remove the action to district court, and suggested any action the state court might take would be void. The trial judge proceeded with the trial, stating that the district court as well as the Sixth Circuit Court of Appeals had dismissed defendant's actions in those courts.

There is nothing else in this record, of which we may take cognizance, indicating removal of these proceedings to the United States District Court. While the motions and the pleadings of various sorts which have been filed by the defendant are multifarious, the law is clear that in order to make extraneous matters a part of the record, they must be examined by the trial judge and authenticated by his signature in such a matter as to make their identity certain.

Parts of a Bill of Exceptions may be in the form of exhibits to be inserted in their proper place, according to the directions given therein; but all of the Bill of Exceptions whether one or more documents, must be presented and examined when it is signed by the judge, and the several papers to be copied must be so marked as exhibits that no mistake in their identity can be made. If any extrinsic matters, which can only be made part of the record by Bill of Exceptions, appear in the transcript without proper authentication they cannot be considered by this court. *Chico v. State*, 217 Tenn. 19, 394 S.W. 2d 648, and cited cases.

Defendant says he was brought to trial without any authority of law. This assignment as well as the third, to the effect that there was no evidence presented to the court to sustain conviction of a charge of obtaining property under false pretenses, seems to be an attack on the weight and legal sufficiency of the evidence.

In this case the State's evidence, supported by appropriate exhibits, was that on October 2nd, 1972, defendant made a loan from the Purity Dairies Employees Federal Credit Union in the amount of three thousand one hundred fifty dollars ($3,150.00) to purchase an automobile. He volunteered to record the appropriate papers. On October 3rd, 1972, he made application for title to the automobile. In doing so made oath to the application in which he allowed the address of the credit union to appear on the application as the same as his own residence. He took title in the name of Jessie McDonald, II. On December 9th, Jessie D. McDonald, II assigned title to the automobile to Jessie D. McDonald, Sr., whose address, according to the instrument was the same as his own. The notary who took his acknowledgement was personally acquainted with him, and recalled the occurrence. The same instrument included a discharge of lien which had been acknowledged on December 7th, 1972. This discharge of lien had the legend, "Purity Dairies Empl. Fed. Cred.

Union", stamped at the place on the instrument where the lienor's signature should have been. On December 11th, 1972, Jessie D. McDonald Sr. made application for title to the automobile and made oath that the vehicle was free from any encumbrances. In the process of this registration he made two additional affidavits, one, to the effect that the automobile was a gift from his son, and the other, for the purpose of transferring license plates, that Jessie D. McDonald and Jessie D. McDonald Sr. were one and the same person. On January 6th, 1973, in response to a notice from the credit union that his payments were in arrears, defendant advised the credit union representative by letter that his loan had been paid in full, and there was no lien on the automobile in question, and that he was no longer in possession of the automobile, nor the owner of it. The proof clearly shows Jessie D. McDonald, Jessie D. McDonald II and Jessie D. McDonald Sr., to be one and the same person in these transactions.

There is no doubt that this evidence fully warranted the verdict of the jury, and clearly preponderated in favor of the correctness of the verdict and against the innocence of the defendant.

By his forth assignment, defendant charges error to the trial court in refusing to quash, or dismiss the indictment against him.

The indictment contains three counts. On order of the trial court the State elected to go to trial on the 3rd count which charged:

" Jessie D. McDonald, heretofore, to wit, on the ___ of December, 1972, with force and arms, in the County aforesaid, unlawfully feloniously and fraudulently, and with felonious intent to defraud one Purity Dairies Employees Federal Credit Union, a federally chartered credit union did obtain from Robert E. Worrall, County Court Clerk or his agent or deputy, clear and unencumbered title to a 1972 Ford LTD automobile of the value of three thousand one hundred fifty ($3,150.00) Dollars, said automobile being at the time encumbered by a lien in favor of Purity Dairies Employees Federal Credit Union, a federally chartered credit union by means of a certain false pretense then and there made by said Jessie D. McDonald, to said Robert E. Worrall, County Court Clerk or his agent or deputy, whereby said Jessie D. McDonald falsely and fraudulently

represented as follows: that a lien in favor of said credit union and that there were no encumbrances on said automobile which representation was false and untrue and was made by said defendant with the fraudulent and felonious intent to deprive said Purity Dairies Employees Federal Credit Union, a federally chartered credit union of its personal property and thereby cause the said Robert E. Worrall to reply on such false and fraudulent representation and to deliver said unencumbered title to said automobile to the said defendant, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Tennessee.

The indictment clearly made out an offense under the statute, (T.C.A. Section 39-1901), and sufficiently apprised defendant of the charges made against him in order that he could prepare his defense and be secure against the initiation of further proceedings against him for the same offense. The false pretense began when defendant offered to record the security agreement and allied papers involved in securing the loan which set out that he granted to the Purity Dairies Employees Federal Credit Union a security interest in one 1972 Ford LTD, 2 door hardtop, serial number

2U68S127257 to secure the payment of a note in the sum of $3,150.00. His felonious and fraudulent intent became manifest upon making application for title to the automobile in which he made oath that his address and that of the credit union were one and the same. He carried out the intent by transferring title to the automobile to himself, while in the process releasing the lien securing the victim, Purity Dairies Employees Federal Credit Union in the amount of $3,150.00, under their security agreement. The representative of the credit union relied upon the representations of defendant that he would properly record the instruments protecting their interest. As stated in the majority opinion, fraudulent representation was made directly and personally to the representative of the credit union, who was the owner of the money, and who turned over the money to him in reliance upon what he said.

There are other assignments in one of which defendant complained the trial court refused to dispose of an

amendment to his motion for new trial. The amendment was filed in erroneous reliance on the rules of civil procedure. The motion came after the trial court had lost jurisdiction of the case by virtue of defendant's appeal. Defendant says it was error to allow the guilty verdict to stand after doubt existed in the jury's verdict. At the trial the jury returned a verdict of guilty and then expressed some reluctance to assess a penalty of three years for the offense. After proper instructions from the trial judge they returned to their deliberations and subsequently fixed the penalty at no more than three years in penitentiary. The verdict of the jury was properly returned. Whether or not to direct a verdict addresses itself to the sound discretion of the trial court. *Carmon v. State*, _____ Tenn. Crim. App. ____, 512 S.W. 2d 595.

A thorough review of this record and the evidence introduced at trial makes it clear that the judgment of the trial court should properly have been affirmed.

CHARLES H. O'BRIEN, JUDGE /S/

IN THE TENNESSEE SUPREME COURT

AT NASHVILLE

FOR PUBLICATION
January 19, 1976

STATE OF TENNESSEE,
Petitioner,

v.

JESSIE D. MCDONALD,
Respondent.

OPINION

FOR PETITIONER:

Milton P. Rice,
Attorney General
Nashville, Tennessee

William C. Koch, Jr.
Assistant Attorney General
Nashville, Tennessee

FOR RESPONDENT:

Jessie D. McDonald, Pro se
Nashville, Tennessee

REVERSED

HENRY, J.

We granted certiorari in this case to consider the single question of whether the reliance of the victim upon the false representation or pretense is necessary to sustain a conviction under Section 39-1901, T.C.A.[3]

We respond in the negative.

I.

Respondent was convicted upon an indictment which charged that he obtained from the county court clerk of Davidson County a clear and unencumbered title to a 1972 Ford LTD automobile which was encumbered by a lien in favor of Purity Dairies Employees Federal Credit Union, by falsely and fraudulently representing that a lien in favor of

---

[3] Section 39-1901, T.C.A. reads as follows:

"39-1901. False pretense. –Any person, who by any false pretense, or by any token or counterfeit letter, with intent to defraud another, obtains from any person any property personal property, or the signature of any person to any written instrument, the false making of which is forgery, shall, on conviction, be punished as in case of larceny.

The words "false pretense" include all cases of pretended buying, borrowing, or hiring, bailment or deposit, and all cases of pretended ownership, where the person obtaining possession intended, at the time he received the property, feloniously to steal the same.

the credit union upon the automobile had been released and that it was free of encumbrances.

Respondent's approach was incredibly ingenious and remarkably bold.

Under the name of Jessie D. McDonald, he applied for and received a loan from the credit union to finance the purchase a new automobile. Upon closing he executed a note and security agreement. He then volunteered to take the documents downtown and apply for a certificate of title. This was the triggering false representation, and the credit union with astonishing credulity and naiveté relied upon him.

The next day he presented himself at the County Court Clerk's Office, using the name of Jessie McDonald, II, and applied for a title certificate. In doing so he falsely and fraudulently gave his own address as the address of the credit union, with the result that the title was issued and mailed to the lien holder at respondent's address.

Subsequently, using the name of Jessie D. McDonald, Sr. Two days thereafter, posing as Jessie D. McDonald, Sr., he presented himself at the County Court Clerk's Office and applied for a certificate of title. The certificate tendered to the clerk indicated that the vehicle had been sold to McDonald, Sr. and contained a notarized release of the lien, which the credit union's name stamped thereon. He made affidavit that the vehicle was free of encumbrances.

In order to avoid the sales tax, he executed an affidavit that the automobile was a gift from his son. In connection the transfer of the license plates, he swore that Jessie D. McDonald and Jessie D. McDonald, Sr. were one and the same.

Subsequent to this he received a notice that payment was due and he wrote the credit union advising that his loan had been paid in full; that there was no lien on the automobile, and that he was no longer the owner.

This prosecution ensued.

II.

Our review is limited to the narrow issue of whether the victim must rely upon the false representation to support a conviction under the statute.

Section 39-1901, T.C.A. originated in Chapter 23 of the Public Acts of 1829 and Chapter 48 of the Public Acts of 1841-1842.

To our knowledge the first case construing these enactments is *McCorkle v. State*, 41 Tenn. 333 (1860). The Court declared the ingredients of the offense to be "obtaining the goods by false pretenses and with an intent to defraud." The Court made this significant comment:

> As was said by Lord Kenyon (3 Term Rep. 103), The statute creating this offense describes it in terms extremely general. It seems difficult to draw the line., and to say to what cases it shall extend; and therefore we must see whether each particular case, as it arises, comes within it.
>
> 41 Tenn. At 336, 337

This conclusion reached more than a century ago continues to be valid. Not even a statute creating a criminal offense can spell out the specifics with mathematical certainty and, indeed, absolute precision is not required. Both common law concept and constitutional due process are satisfied when the statute informs all citizens as to what the state commands or forbids, and outlines the proscribed conduct with reasonable certainty. Its terminology must give fair warning, *Raley v. Ohio*, 360 U.S. 423, 3 L. Ed. 2d 1344, 79 S. Ct. 1257 (1959), and must not be a trap for the innocent, *United States v. Cardiff*, 344 U.S. 174, 97 L. Ed. 200, 73 S. Ct. 189 (1952). Section 39-1901 meets these standards.

A significant recent case is *Beck v. State*, 203 Tenn. 671, 315 S.W. 2d 254 (1958). There, the Court adopted the holding of *State v. Morgan*, 109 Tenn. 157, 69 S.W. 970 (1902) and reiterated that the elements of the offense of violating the statute on false pretenses are: "(1) the pretenses,

(2) the falsity of the same, (3) the felonious and fraudulent intent, (4) the description of the property, and (5) the reliance of the victim upon the representations." (Emphasis supplied). The state in brief correctly characterized the fifth element (reliance) as dictum in view of the fact that the false representation was made by Beck directly to the victim, hence the Court was under no necessity to address this requirement. In *Morgan*, the Court, in passing upon the validity of the indictment, merely analyzed it under five headings, one of them being "reliance" of the victim. Again the Court did not directly address the necessity for reliance.

The latest pertinent pronouncement of this Court was in *Mullican v. State*, 210 Tenn. 505, 360 S.W. 2d 35 (1962) wherein the Court enumerated the elements of the offense thusly:

> [T]he false representation made must be representation representation of a past or existing fact, whether it be by oral or written words or conduct, which is calculated to deceive, or intent to deceive, and does as a matter of fact

> deceive; and by means of which, by doing these things, the person who does it obtains something of value from the person injured without proper compensation. (citations omitted) . . ., under this statute the intent to defraud is the gravamen or an essential or element in the crime.
>
> 210 Tenn. At 511.

Dicta aside, the courts of this state have never held that the reliance of the victim is an element of the offense proscribed in Section 39-1901. Indeed, there is an analogous line of cases to the contrary. As a matter of fact, *Beck* supra, correctly treats as settled law that it is not necessary that the representation must be calculated to deceive a man of ordinary prudence and caution. As pointed out in Vanderbilt L. Rev., pages 1134, 1135 in commenting on this phase of *Beck*, "Regardless of the merits or demerits in tort law, it would seem strange indeed to let the necessity of such reliance remain in the law of crimes to work a kind of estoppels against victims of false pretenses who may be deficient in astuteness and vigilance in favor of the

perpetrators thereof ..." Would it not be equally strange to establish as a part of our law that the reliance of the victim is an essential element of the offense of obtaining money or property under false pretenses?

It is obvious that there must be reliance by someone, but this modern day and age when fraud and deceit are practiced with sophistication and ingenuity a narrow construction such as this would be tantamount to a judicial conference of the proverbial "license to steal."

We hold that the reliance of the victim is not an essential element of the offence "false pretense" as defined in Section 39-1901 T.C.A. We hold that our statute is satisfied, in this respect, when the person to whom the false representation is made or false token or counterfeit letter is offered, relies upon the same to the ultimate detriment of the victim.

An excellent line of reasoning is contained in *Commonwealth v. Johnson*, 167 Ky. 727, 181 S.W. 368 (1916) [According to our own case of *State v. Higgins*, 148 Tenn. 609, 256 S.W. 875 (1923) the Kentucky statute is markedly similar to ours.]

The Court said:

> The statute does not require that the false statement Should be made to any particular person, or that it Should be with the intention of committing a fraud Upon the person to whom the false statement was Made. The offense is committed when the false Statement is made, with the intention to commit a Fraud, and money or property is thereby obtained.
>
> * * *
>
> The purpose of the statute is to punish the perpetrator Of fraud committed through any false pretense. For Gist of the offense is the successful misrepresentation ,regardless of the person to whom it was made.
> (Emphasis supplied)
>
> 181 S.W. at 370.

The judgment of the trial court is reinstated; that of the Court of Criminal Appeals is Reversed.

HENRY, J./S/

CONCURRING:
FONES, C.J.
COOPER, J.
BROCK, J.
HARBISON, J.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED: March 15, 1976
FOR PUBLICATION

JESSIE D. MCDONALD,
Petitioner,

Vs.

STATE OF TENNESSEE'
Respondent.

DAVIDSON CRIMINAL NO. B-317

OPINION ON PETITION TO REHEAR AND MOTIONS

The petition to rehear is respectfully overruled.

The motion to set aside the conviction is respectfully denied.

The motion for a stay pending application to the Supreme Court of the United States for certiorari is granted, providing the petition is timely filed. Pending the filing and disposition of said petition, the judgment of this Court will be stayed and defendant may remain upon his present bond.

HENRY, J. /S/

Docket No. 05-1139

UNITED STATES SUPREME COURT

EX PARTE, JESSIE D. MCDONALD,
Petitioner

[redacted]

For the Petitioner:
Dr. Jessie D. McDonald, Ed.D.
2134 14th. Avenue North
Nashville, Tennessee 37208
(615) 506-7100

Docket No. 05-1139

UNITED STATES SUPREME COURT

EX PARTE, JESSIE D. MCDONALD,
Petitioner

MOTION FOR SUMMARY DISPOSITION

The Petitioner, Jessie D. McDonald, pro se respectfully moves this Court pursuant to Rule 21 of this Court Rules, to grant a 'SUMMARY DISPOSITION' of this case, pursuant to Rule 56.01 of Tennessee Rules on Civil Procedure, (T.R.C.P., hereinafter) on grounds: (1) Petitioner has been denied access to state courts to appellate review and federal court; and (2) There is no genuine issue involved to justify a hearing on the merits of the case, as shown more clearly in the Memorandum of Facts, as shown herein.

Memorandum of Facts

This case was assigned to Division VI of the Tennessee Criminal Court, in Nashville, Tennessee, under Docket No. B-317, to consider a Motion for Relief from Judgment, under Rule 60.02 of T.R.C.P., which states:

60.02. Mistakes —Inadvertence —Excusable Neglect — Fraud, etc. — "On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation, but the court may enter an order suspending the operation of the judgment upon such terms as to bond and notice as to it shall seem proper pending the hearing of such motion. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of error coram nobis, bills of review and bills in the nature of a bill of review are abolished, and the

procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

On grounds, the State fraudulently misrepresented to the trial court, a civil matter that was wanton of criminality, the lawful purchase of a 1972 Ford, LTD automobile, that was purchased under a valid contractual agreement, that was never in dispute, nor was the loan that was used to purchase the said automobile was alleged to have been obtained through fraudulent information; and the credit union had never had possession of the said vehicle; and did obtain a void judgment for a crime, the petitioner had never been indicted for, when the indictment that was used to bring this case to trial, alleged the property to be a ' title to a 72 Ford, LTD, automobile" , but the jury based its verdict on the property being the '72 Ford, LTD, automobile'.

On March 08, 2006, the trial court abused its discretion and denied the Motion for relief from judgment, due to the expiration of thirty years and Rule 60.02 set the

time limit to not more than one year after the date of the judgment.

Reasons why summary disposition is proper

The petitioner states that there is no genuine issue involved to justify a hearing on the merits for the following reasons: (1) In January of 1973 when this case came to trial, there was no time limitations for the application of relief under Rule 60.02; (2) The judgment is void, when the conviction is on a charge that has never been under an indictment, because it is unconstitutional and in violation of the 5th. Amendment to the United States Constitution; (3) Any laws created to prevent an established right, is considered to be 'ex post facto' in nature and cannot be applied on a retroactive basis; and (4) The petitioner has been denied access to appellate review in the state courts, by Orders from the Tennessee Supreme Court and in the U.S. District court, by an Order that was entered by Aleta A. Trauger, U.S. District Judge, on September 15, 2005.

because petitioner is financially unable to pay a court ordered attorney fee's to the Tennessee Attorney General for trying to get relief from the void judgment at bar.

Conclusions of Law

Citing the exact same words from the Tennessee Court of Criminal Appeals, on direct appeal from the original conviction: "Whatever crime the defendant committed, it was not obtaining property by false pretenses in violation of that statute. He was, therefore, convicted of a crime not charged in the indictment. Such a conviction cannot stand. *Church v. State*, 206 Tenn. 336, 333 S. W. 2d 799; *Huffman v. State*, 200 Tenn. 487, 495, 292 S. W. 2d 738; *Clark v State*, 197 Tenn. 67, 270 S. W. 2d 361.

See also: 21 Am. 2d ., Criminal Law §226, p. 265. Conviction upon a charge not made or without evidence of guilt is a denial of due process of law. *Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654.

ACCORDINGLY, since a void judgment is binding on no one, the petitioner request relief from this court, by GRANTING this application for Summary Disposition.

Relief Sought

WHEREFORE, the Petitioner Jessie D. McDonald, pro se respectfully request the Court to set aside the judgment of conviction; and grant all other and further relief the court deems proper; and to determine if the actions of the petitioner was 'unreasonable', by making several attempts to have a void judgment set aside.

Respectfully submitted,

/s/ Dr. Jessie D. McDonald, Ed.D.
2134-14th. Avenue North
Nashville, Tennessee 37208
(615) 506-7100

Exhibits to Motion

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IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE, DIVISION VI

JESSIE D. MCDONALD	)	**Filed March 8, 2006**
	)	
V.	)	**No. B-317**
	)	
STATE OF TENNESSEE	)	

ORDER

This matter came before the Court on March 3, 2006, upon Petitioner's Motion for Relief from Judgment. The Petitioner claims that he is entitled to relief based on Rule 60(b). The Court is under the assumption that the Rule being cited are the Rules of Civil Procedure, in particular Rule 60.02 of the Tennessee Rules of Civil Procedure in which Relief form Judgment may be granted based on mistakes, inadvertence, excusable neglect, fraud, etc. Tennessee Rule of Civil Procedure 60.02 states that for this Court to review such, it must be filed in a timely fashion, in particular"not more than one year after the judgment, order or proceeding

was entered or taken." As noted in the file, the Petitioner was found guilty by a jury on January 1973. The time between that judgment and this motion has surpassed the allowed filing time, and because such motion was not timely filed, the Court respectfully dismisses Petitioner's motion.

It is so ORDERED.

Entered this 8th. day of March, 2006
/s/ Mark J. Fishburn, Judge
Criminal Court, Division VI

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

JESSIE D. MCDONALD, Petitioner,	)	Filed: 09/15/05
v.	)	Case No. 3:05-0243 Trauger
PAUL G. SUMMERS, Respondent.	)	

MEMORANDUM and ORDER

Presently pending before the court is the Magistrate Judge's Report and Recommendation (R&R) entered July 1, 2005 (Docket Entry No. 22), to which the petitioner filed timely objections (Docket Entry No. 23).

STANDARD OF REVIEW

Under Rule 72(b), Fed. R. Civ. P., and 28 U.S.C. §636(b)(1), the court is required to make a *de novo* determination of the portions of the Magistrate Judge's recommendations to which objections have been made. The

District Judge may accept, reject, or modify recommended decisions, receive further evidence, or recommit the matter to the Magistrate Judge with instructions.

ANALYSIS

Recommendations 1 and 2

The Magistrate Judge recommends that the petitioner's motion for summary judge be denied, and this action dismissed with prejudice. (Docket Entry No. 22, pp. 1-4,8) The Magistrate Judge provides two reasons for his recommendation. First, citing *United States v. Beggerly*, 524 U.S. 38, 45 (1998), the Magistrate Judge concludes that the enactment of Rule 60(b), Fed. R. Civ. P. abolished the writ of error coram nobis in civil actions. (Docket Entry No. 22, p. 3) Second, citing several unpublished Sixth Circuit Court cases, the Magistrate Judge concludes that a writ coram nobis must be presented to the court that pronounced judgment. (Docket Entry No. 22, p. 4)

The petitioner offers the following arguments in opposition to these two recommendations.

First, the petitioner argues that:

> [t]he magistrate judge has failed to present a genuine issue in his report that there is a genuine issue involved that require a trial or a hearing on any issue, to prevent the award of summary judgment.

(Docket Entry No. 23, p. 3) Second, the petitioner argues that:

> even under the magistrate judge's theory on Rule 60(b), Fed. R. Civ. P., [the] petitioner is still entitled to relief since this court has jurisdiction under §40-26-105, TCA and it is the state['s] statute that authorize relief by error by writ of coram nobis.

(Docket Entry No. 23, p. 3)

The court liberally construes the petitioner's first argument to mean that the Magistrate Judge did not establish that there was no genuine issue of material fact that required a trial or a hearing on the issues before the court. The Magistrate Judge is not required to establish that there were no genuine issues of material fact. On the contrary, it is the petitioner's responsibility to establish that he is entitled to relief.

As to the petitioner's second argument, while Tenn. Code Ann. § 40-26-105 does provide relief in the form of a writ of *coram nobis*, the district court does not derive its jurisdiction from Tennessee statute. Despite the petitioner claim that he has been denied access to State courts (Docket Entry No. 23, pp. 2-3), if he seeks relief under § 40-26-105, then that is where he must seek it.

The court is of the opinion that the Magistrate Judge's conclusions are correct, *i.e.*, that enactment of Rule 60(b) abolished the writ coram nobis in federal civil action, and that in any event, such relief lies solely with the court that entered judgment against the petitioner – in this case, the State of Tennessee. Accordingly, the recommendation that the petitioner's motion for summary judgment be denied is ACCEPTED. For reasons that will become clear, the recommendation that this action be dismissed with prejudice is ACCEPTED as well.

Recommendation 3

The Magistrate Judge recommends barring the petitioner from re-litigating his 1973 conviction for obtaining property under false pretenses in the future under any legal theory . (Docket Entry No. 22) The recommendation is couched in terms of the doctrine of *res judicata*. The Magistrate Judge's is of the further view that, because "this issue has been litigated, and re-litigated in both state and federal courts, including the highest court in the land, "the petitioner has abused the judicial process.

As to this claim being barred by *res judicata*, the petitioner argues that the doctrine "res judicata' cannot attach to this case, unless this court has jurisdiction and previously rendered a judgment on the merits that involved the issue . . . ." at bar. (Docket Entry No. 23, p. 4) The petitioner argues further that he does not "challenge the judgment, but the procedure the court used to deny [him] relief in the state courts . . . ." (Docket Entry No. 23, p. 4)

With respect to the Magistrate Judge's recommendation that the petitioner be barred from raising this issue in district court, the petitioner argues that there is "nothing in the constitution either federal or state that place[s] a limitation on the number of time[s] an application can be made to any court." (Docket Entry No. 23, p.4) The petitioner also maintains that "no court has jurisdiction to . . . discriminate against [him], by singling him out for exercising his federal protected rights to seek relief." (Docket Entry No. 23, p.4)

The petitioner's first argument is without merit. It is clear from the petition and motion for summary judgment that, regardless of what the petitioner claims he is challenging, he ultimately seeks to have his 1973 conviction overturned, an issue that the petitioner has litigated many times without success in this and other federal and state courts. The Magistrate Judge is correct that any further litigation that seeks to have the 1973 conviction overturned

would be barred under the doctrine of *res judicata*, because if an alternative legal theory exists for overturning his 1973 conviction, the petitioner was required to have advanced that legal theory in his prior litigations.

As to the petitioner's argument that the court has no authority to bar him from raising this claim again, and that to do so would violate his constitutional rights, the court agrees. Although the Magistrate Judge is correct when he writes that "the district court has broad discretion 'to controlthe disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. . ., '''the court cannot absolutely foreclose an individual from initiating an action in federal court. *Ortman v. Thomas*, 99 F.3d 807, 811 (6th. Cir. 1996). However, the court may impose pre-filing restrictions on an individual with a history of repetitive or vexatious litigation. *Feathers v. Chevron U.S.A., Inc.*, 141 F. 3d 264, 269 (6th. Cir 1998). The petitioner's litigation history pertaining to his 1973

conviction clearly warrants such action.

Federal courts possess the inherent authority to sanction a party who acts in bad faith, vexatiously, wantonly, or for oppressive reasons. *See Chambers v. NASCO, Inc.* 501 U.S. 32, 43-46 (1991). This authority applies where, as here, a party files repetitive frivolous lawsuits where the issue at bar previously has been adjudicated. *See e.g., Johnson v. Johnson,* 1995 West Law 385142 (6th. Cir. (Mich.))(warning of future sanctions against an appellant who had filed his third attempt to vacate a 1974 state court judgment). Because the petitioner clearly falls into the foregoing categories, he is forewarned that, should he attempt to bring any further actions in this court that seek to overturn his 1973 conviction, appropriate monetary sanctions will be imposed against him.

The Magistrate Judge's third recommendation is

ACCEPTED as MODIFIED above.

Recommendation 4

The Magistrate Judge has recommended that, should the petitioner again raise the issue of his 1973 conviction in this court, he will be sanctioned. As explained *supra*, this recommendation is ACCEPTED.

Recommendation 5

The Magistrate Judge recommends that the petitioner be barred from filing any further civil litigations in forma pauperis. The petitioner argues that this matter is not before the court.

By bringing yet another lawsuit seeking to overturn his 1973 criminal conviction in State Court, the petitioner himself has chosen to write another episode in his twenty-plus year history of vexatious litigation in this court. In doing so, the petitioner himself has raised the issue by forcing the court to determine what to do about the petitioner's impact on scarce judicial resources, not to mention the adverse effect on parties called to respond to his claims. Such matters

are always properly before the court.

In his R&R, the Magistrate Judge has quoted a 2002 Order in which the United States Supreme Court wrote the following regarding the petitioner:

> 'As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petition in non criminal matters from petitioner unless the docketing fees required . . . is [sic] paid . . . .'

Docket Entry No. 22, p.6)(emphasis in the original omitted) The Order quoted above followed a similar Order in 1989, in which the Supreme Court took the unprecedented action of barring the petitioner prospectively from filing any further writs *in forma pauperis* that pertaining to his 1973 conviction. Docket Entry No. 22, pp. 4-5)

The court relies on the Supreme Court's actions cited above as both authority and justification to follow suit. The Magistrate Judge's recommendation to bar the petitioner from filing any future civil actions *in forma pauperis* is ACCEPTED.

Recommendation 6 and 7

The Magistrate Judge recommendations that any future civil action brought by the petitioner, even if he pays the civil filing fee, be subject to an initial frivolity review similar to that set forth under 28 U.S.C. § 1915, and that if any complaint so filed is deemed to be frivolous, malicious, of if it fail to state a claim on which relief may be granted, that the petitioner be subject to appropriate monetary sanctions. Again, the petitioner argues that this matter is not before the court.

As explained previously, matters pertaining to abuse of process are always before the court. Thus, the petitioner's argument is without merit.

In his R7R, the Magistrate Judge notes that the petitioner has filed fourteen cases in this court since 1982. (Docket Entry No. 22, p. 6) However, the true magnitude of the petitioner's litigation history in this court has been lost

during the transition from paper records to computer records. Research has uncovered a 1989 case filed by the petitioner, in which he was proceeding *pro se* and *in forma pauperis*, that was dismissed as frivolous, and the petitioner sanctioned. *Jessie D. McDonald v. Yellow Cab Metro, Inc.*, No. 3:89-0668(M.D.Tenn.,Oct. 10, 1989)(Wiseman,cj.). In its Order dismissing the action as frivolous, and ordering sanctions against petitioner, the court wrote:

> [T]his case represents a pattern and course of conduct on the part of the plaintiff. . . .
>
> The Court takes judicial notice of its own records. The Court finds that the plaintiff has filed 65 lawsuits In this Court, but prevailed in none of them. In fact, The overwhelming majority of the cases have been Disposed of as frivolous or malicious claims without Any trial on the merits. . . .[T]he Court [also] notes that the plaintiff has abused the application for extra-Ordinary writs to the United States Supreme Court to The point that the Supreme Court has barred him Filing any further in forma pauperis petitions for Extraordinary writs. . . .

> This man, if joined by others, would paralyze
> The judicial system of this nation. He continues
> To abuse the right of all citizens to guaranteed
> Access to the courts. This most important right
> finds its roots in the Magna Carta's guarantee
> of access to the courts 'without sale, denial or
> delay.' This abuse must not continue.
>
> Therefore, the Court finds that sanctions are
> Appropriate for plaintiff's violations of Rule 11
> By the filing of this lawsuit. Plaintiff
> shall be assessed double the ordinary costs
> for the filing of this suit, that is two times one
> hundred twenty dollars, or two hundred forty dollars.
> Second, the Clerk shall not accept any further
> filings from plaintiff, Jessie D. McDonald,
> until the court is personally advised that the
> sanctions here imposed have been paid in full.
> Finally, the Clerk is hereby ORDERED to
> Assign all pleadings filed by the plaintiff to
> Chief Judge Thomas Wiseman, Jr., in order that
> His future activity before this court
> may be efficiently monitored.
>
> Plaintiff is hereby given notice that if the
> sanctions imposed by this Order do not
> serve to prevent his filing of frivolous pleadings
> in the future, then more severe sanctions may
> be imposed by the Court.

Id.(Docket Entry No. 14,pp. 2-3) (underline in the orignal, internal citations omitted) The Sixth Circuit affirmed the judgment of the district court, including the imposition of

sanctions on McDonald, who was proceeding *in forma pauperis* in that action. *Id.* (Docket Entry No. 16).[1]

Although §1915 is intended for plaintiffs/petitioners who bring civil actions *in forma pauperis*, the court knows of no reason why those same provisions should not be used as a basis for preventing future abuse of judicial process by the petitioner, regardless of whether he pays the filing fee or not. The Magistrate Judge's further recommendation that the petitioner be sanctioned if his complaint is determined on initial review to be frivolous, malicious, or it fails to state a

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[1] *Jessie D. McDonald v. Yellow Cab Metro, Inc.*, No. 89-6104, West Law 149393 (6th. Cir. (Tenn.)).

claim, also is consistent with preventing future abuse of process.

The Magistrate Judge's recommendations pertaining to future civil actions in which the petitioner pays the filing fee is ACCEPTED

Recommendation 8

It appears from the record that the petitioner has not paid the $4,180.00 that he was ordered by the court to pay in Case No. 3:00-1218. The Magistrate Judge recommends that the petitioner be required to show whether he paid the amount ordered, and if not, that he be barred from filing in any future civil action until he shows that the full amount has been paid. The petitioner argues that the court in Case No. 3:00-1218 abused its discretion in ordering him to pay because he was proceeding *in forma pauperis* in that action.[2]

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[2] The petitioner cites three cases in support of his argument: *Pothier v. Rodman*, 261 U.S. 307 (1923); *Gray v. Missouri Pac. Ry. Co.*, 23 F. 2d 190 (6th. Cir. 1928); *United States ex rel. Randolph v. Ross*, 298 F. 64 (6th. Cir. 1924). None of the cases cited pertain to sanctions or money judgments against a party proceeding *in forma pauperis*. Pothier v. *Rodman*, while it touches on the general right of a party to proceed *in forma pauperis*, the issue is the Supreme Court's lack

Under 28 U.S.C. §1915, "Proceeding in forma pauperis", provides that "[j]udgment may be rendered for costs at the conclusion of the suit or action in other proceeding . . . ." *Id. At* §(f)(1). The statute does not distinguish between parties who pay the civil filing fee, and those who proceed *in forma pauperis*. Under Rule 11 Fed. R. Civ. P., the district court also has the inherent authority to order sanctions, such as the payment of attorney fees, by motion, or on its own initiative, if the court determines that the action is brought "for any improper purpose, such as to harass. . ." *Id. At* §§ (b)(1), (c)(1).

Notwithstanding the foregoing, awarding attorney fees against a party proceeding *in forma pauperis* is not the norm, and such as award may be made under exceptional circumstances, and then only if the court concludes both that the action was subject to dismissal without the necessity of a

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jurisdiction because the appellant did not appeal first to the appropriate court of appeals. *Gray* pertains to the Arkansas "look-out" statute in a diversity case arising from a train-vehicle mishap in Arkansas. In ex rel. Randolph v. Ross, the issue was whether an attorney representing a plaintiff proceeding in forma pauperis was himself required to file an oath giving security for the costs of the litigation.

trial, and that the claims raised therein were so substantial as to be unreasonable, groundless or without foundation. *See Farmer v. Marshall*, No. 86-3898, 1987 West Law 368838 at * 1 (6th. Cir. (Ohio))(citing *Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980)(per curiam); *Harris v. Forsyth*, 742 F. 2d 1277 (11th. Cir. 1984); *Flint v. Haynes*, 651 F. 2d 970 (4th. Cir. 1981), *cert. Denied*, 454 U.S. 1151 (1982). Exceptional circumstances exist when an action is "unreasonable, without foundation, vexatious and brought in bad faith . . . ." *Farmer*, 1987 West Law at * 1 (citing *Hughes*, 449 U.S. at 14-15).

In Case No. 3:00-1218, the action was dismissed (Docket No. 21), following which the defendants moved for the award of reasonable attorney fees (Docket Entry No. 22), and the petitioner responded (Docket Entry No. 27). The defendants' motion for attorney fees subsequently was granted because of the petitioner's "history of . . . endless and frivolous litigation . . . ." (Docket Entry No. 28) The

award of attorney fees to the defendants in Case No. 3:00-1218 was in accordance with federal statute, the law in the Sixth Circuit, and the Federal Rules of Civil Procedure.

Inasmuch as it appears from his response that the petitioner has not paid the amount previously ordered by the court, the petitioner shall, within ten (10) days of the date of the entry of this Order, either show that he has paid the attorney fees ordered in Case No. 3:00-1218, or show cause why he should not be held in contempt of court for not having done so. Moreover, until such time as the petitioner does one or the other, he shall be barred from bringing any future civil actions in this court.

The Magistrate Judge's eighth recommendation is

ACCEPTED as MODIFIED above.

Petitioner's Motion for a Writ of *Mandamus*

After the R&R entered, the petitioner filed a writ of *mandamus* to "compel" the chief Justice of the Tennessee Supreme Court and the Clerk of the Tennessee Supreme Court to "follow the normal and regular procedure of considering and disposing litigations that are properly presented in accord with its requirements." (Docket Entry No. 24) The district court has no authority to issue a writ of *mandamus* directing a state court, or state judicial officers in the performance of their duties. *Haggard v. Tennessee*, 421 F. 2d 1384, 1386 (6th. Cir. 1970). Because the petitioner has no arguable basis in law or fact that would entitled him to a writ of *mandamus*, his motion (Docket Entry No. 24) is DENIED as frivolous within the meaning of 28 U.S.C. §1915(e)(2). See *Neizke v. Williams*, 490 U.S. 319 (1989).

CONCLUSION

After reviewing the record thoroughly, including the R&R and the documents ~~filed by~~ the petitioner in response thereto, the court is of the opinion that the Magistrate Judge'

conclusions are correct, as modified herein. Accordingly, the R&R is ACCEPTED as MODIFIED, and made the findings of fact and conclusions of law of this court.

For the reasons explained above, the petitioner has failed to state a claim on which relief may be granted within the meaning of 28 U.S.C. §1915(e)(2)(B)(ii). Therefore, an appeal from the judgment of this court would NOT be taken in good faith. *Coppedge v. United States*, 369 U.S. 438, 445-46 (1962). Accordingly, the petition is NOT certified to pursue an appeal from this judgment *in forma pauperis*. 28 U.S.C. §1915(a).

Finally, the Clerk is DIRECTED to provide a copy of this Order to each District Judge and Magistrate Judge in the Middle District of Tennessee. The Clerk is further DIRECTED to provide a copy of this Order to the intake clerks and pro se staff attorneys. The Clerk is further directed to instruct the intake clerks to forward any future actions brought by the petitioner to the pro se staff attorneys-

regardless of any filing fee paid-for initial review in accordance with this Order.

It is so ORDERED.

/S/ Aleta A. Trauger,
United States District Judge